

CHRISTY, (R)

IN RE

NOMINATION OF PHILIP S. WALES

Pending before the Committee on Naval Affairs.

BRIEF OF ROBERT CHRISTY, *Amicus Senatûs.*

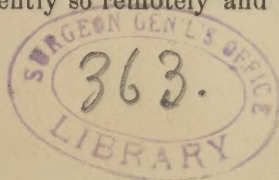
*To the Honorable Chairman and Members of the Committee
on Naval Affairs of the Senate :*

I have the honor to acknowledge the gracious permission of your honorable chairman, to present my views upon the legal questions involved in the pending nomination of Commander PHILIP S. WALES.

It will, no doubt, be agreeable to your honorable Committee that I should, in the outset, define my *status* in respect to this matter.

I respectfully submit that a citizen of the United States stands substantially toward Congress, as an *amicus curiae* does toward a judicial tribunal. The latter is privileged upon all proper occasions, "to give information of some matter of law in regard to which the court is doubtful, or mistaken" though he be neither of counsel to the cause nor otherwise directly interested therein.

It may, however, be a matter of surprise to the honorable Committee that one apparently so remotely and slightly in-



terested in this cause assumes to advise the honorable Committee. But a recent order of the honorable Secretary of the Navy, practically banishing a well known Medical Director because of a suspicion merely, that he intended to intervene between the pending nomination of *Commander Wales*, and its confirmation by the Senate; and a well authenticated rumor that the same high prerogative of office would upon occasion be employed against any other subordinate of the honorable Secretary, who should be suspected of entertaining similar *unexecuted intents*, have enforced silence upon that class of persons most immediately and deeply interested in this matter.

But to the argument. The Constitution of the United States clearly contemplates that all nominations made by the President of the United States shall be by and with *the advice* of the Senate.

The report of the Committee on Naval Affairs of the Senate, which, expresses, no doubt, their deliberately formed convictions, (January 23, 1879) contained clear and explicit *advice* to the President and his Cabinet as to the pending and similar nominations, that is to say, that *Medical Inspectors* were not eligible for appointment to the office of "Chief of the Bureau of Medicine and Surgery."

Before submitting my own views as to the law of the case, I will endeavor to answer the chief propositions contained in the anonymous brief, heretofore filed by me, that was presumed prepared to sustain the position assumed by the honorable Secretary of the Navy in respect to this nomination.

The first, being that *juniority* should govern the selection of incumbents for this office. "It prevents the corps being damaged" (says the brief) "by too frequent changes in the office." However this argument answers itself. For *Commander Wales* is by no means the *youngest* of the present class of *Inspectors*; and the force of the argument necessa-

rily intensifies as you descend in the scale, and is strongest when you reach the youngest member of the corps. It is, perhaps, unnecessary to add that *junior* does not prevail over *senior*, unless in construing statutes, a proposition however denied with emphasis by the writer of the brief; or to suggest that there is a seeming impropriety in asserting the superior rights of youth to a body whose honorable titles are derived from *senex*.

The second proposition is that the system of selecting with regard to age, rank and length of service, is obnoxious to the principles of true economy, (page 6,) "because," says the anonymous writer, "the revenues of the country have been heavily taxed by the enlargement of the grade of Surgeon-General on the retired list, which has the same pay as that of Commodore." Although I do not feel the slightest apprehension that this honorable Committee would strike down the law that the revenues of the Government might be protected, yet I am constrained to say that it has been established by actual mathematical calculation, if the two Medical Directors, whose age will entitle them to be retired from the active list with the rank and pay of Commodores within the next four years, should both be appointed Chief of the Bureau, the additional expense to this beneficent Government would be but \$900.00 per annum.

It may reassure the honorable Committee to be advised that the honorable the Secretary of the Treasury, in his recent efforts to make resumption an actuality did not take this element of taxation of the revenues into consideration at all; however, this may have been because it was not brought to his attention, the anonymous brief not then being in existence.

Third proposition. That the whole does not contain all its parts. For this learned jurist argues, throughout the greater part of the brief, that all Surgeons are by law eligi-

ble to this office. Medical Directors and Inspectors alike, and *a priori* that the solemn enactment of Congress, "that chiefs of Bureaus may be appointed from officers having the relative rank of *Captain* in the staff-corps of the Navy on the active list, was rendered necessary by the controlling power of the novel principle of *juniority* hereinbefore alluded to, to make Medical Directors eligible to appointment to this office at all. Though perhaps it was a gracious permission extended by Congress to the President in times of great public exigency, to pass by the Medical *Inspectors* of the rank of Commander, although they had clear precedence under the law, and select from that "*senile*" branch of the corps, Medical *Directors* of the rank of Captain. Time was when Aristotle was considered reliable authority upon forms of correct reasoning. When his dictum, "Dictum de omni et nullo," that whatever is predicated universally of any class of things, may be predicated in like manner of any thing comprehended in that class," was received by the learned as the true doctrine, but now, forsooth, it requires a solemn act of Congress to enable the *genus* to embrace its own *species*. What would you think of a Senator who should rise in his place and seriously propose that a law that provides, that a designated officer should be selected from the citizens of the District of Columbia, ought to be amended by a provision permitting the selection to be made from the citizens of Washington in the District of Columbia? These three propositions are the frame-work of the brief, and I dismiss them with the remark that it is scarcely possible to discuss them with the gravity that the importance of the subject demands.

I beg leave to say, however, that if age, rank, merit length of service are hereafter to be disregarded in making promotions in this branch of the naval service; if an ignoble and ungenerous spirit of economy is to override the clear

will of the legislative branch of the government, then the discipline, the *esprit de corps*, the laudable ambition of the Navy will, to say the least, receive a severe blow. If the title of Medical Director is to be an empty sound, signifying nothing; if their rank is to be a barren honor, and not entitled to respect, let them be promptly abolished, and let us have but one grade, one rank, and one title, which, according to the logic of the brief, to secure to the Surgeons in the Navy honor, advancement and emolument, should be that of Medical *Inspector*. If this doctrine is to prevail, no man of sense, no man with self-respect, no man of ambition will ever hereafter allow himself to pass from that favored class, Medical Inspectors; no man who interprets the law as does the writer of the brief, will ever hereafter enter that Botany bay of Surgeons of the Navy, the land of Medical Directors, who are, it seems, to be made the pariahs of the Navy of the United States.

No reader of history is ignorant of the fact that the highest incentive to the sailor and the soldier, alike, to do his duty, that nerves his arm, inspires his heart with courage in time of action, that enables him to endure privations and hardships without a murmur, is his pride in his profession and his belief that by all this he may advance to the highest rank attainable in his arm of the service.

I have collected and grouped together such maxims of the law as relate to the construction of statutes. Such as I hope may serve as lights in exploring the acts of Congress under consideration, if so be the honorable Committee should find any gloom of doubt whatever surrounding them. These all are well settled, long established, and universally received legal aphorisms, safe guides to the true intent of the legislative mind.

"It is not the words of the law," says the ancient Plowden, "but the internal sense of it, that makes the law; the

letter of the law is the body; the sense and reason of the law is the soul."

"*Qui haeret in litera, haeret in corteci*"—"The intention shall prevail."

"In applying rules for interpreting statutes, to questions on the effect of an enactment, we can never lose sight of its objects. That must be the truest exposition of a law, which best harmonizes with its design, its objects and its general structure."

Vattel, Bk. 2, Ch. 17 sec. 285.

"A thing, which is in the letter of a statute, is not within the statute, unless it be within the intention of the makers."

Bac. Abr. tit. statute, 1.

"It is therefore an established rule of law, that all acts in *pari materia* are to be taken together; and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view."

Dwarris on Statutes, p. 183.

"It does seem to be the prevailing doctrine that when one statute refers to another which is repealed, the words of the former act must still be considered as if introduced into the latter statute."

Idem. p. 192.

"Words of permission shall in certain cases be obligatory. When a statute directs the doing of a thing for the sake of justice, the word *may* means the same as the word *shall*. So if a statute says that a thing *may* be done, which is for the public benefit, it shall be construed that it *must* be done."

Idem. p. 220.

I now beg leave to collate the various statutes that should be examined with reference to the question in issue.

By an act approved July 31, 1861, entitled "An Act to

increase the Medical Corps of the Navy," it was provided, that, the Medical Corps should consist of eighty Surgeons, and one hundred and twenty, passed and other assistant Surgeons.

By an act approved July 5, 1862, entitled "An Act to reorganize the Navy Department of the United States," the bureau of Medicine and Surgery was established, and the President required to appoint, by and with the advice and consent of the Senate, "a Chief of the Bureau of Medicine and Surgery," from the list of the Surgeons in the Navy.

It will be observed that at this time there were but two classes in this corps, and that the President was required to appoint from the *higher* class.

By an act approved March 3, 1871, the staff officers of the Navy were organized into corps, and it was provided that the officers of the Medical Corps on the active list of the Navy should be fifteen Medical Directors, of *the relative rank of Captain*; Fifteen Medical Inspectors of *the relative rank of Commander*; Fifty Surgeons of *the relative rank of Lieutenant-Commander, or Lieutenant*; and one hundred Assistant Surgeons of *the relative rank of Master or Ensign*. It was further provided that the foregoing grades for the staff Corps of the Navy should be filled by appointment from the *highest numbers in the Corps, according to seniority*. And it was further provided that the Chief of Bureau "May be appointed from officers having the relative rank of Captain in the staff corps of the Navy on the active list."

The same principle of classification and rule of advancement were by this act applied to the pay and engineer corps of the Navy as well.

It is worthy of remark that from this time until the present nomination, the law was properly interpreted and the Chief of the Bureau of Medicine and Surgery selected uniformly from the highest grade in the corps, that is to say, from the

Medical Directors of the grade of Captain. And this, without detriment to the corps, or injury to the public. And certainly with the full and unqualified approbation of all classes in the naval service.

"In the construction of a doubtful law," says the Supreme Court of the United States, in *Edward's lessees vs. Darby*, "The contemporaneous construction of persons appointed to execute it is entitled to great respect."

This brings us to the law as it exists to-day. The revised statutes substantially re-enact the foregoing provision, and but for a clause to which I will call your particular attention hereafter, there would be no room for the slightest controversy. These statutes leave all questions as to rank and grade undisturbed. The Medical Director retains his relative rank of Captain; the Medical Inspector that of Commander, and so on down the list as provided in the theretofore existing laws, already cited.

Chaos had now given place to order. Confusion to method. The Staff of the Navy, their rights long ignored, themselves long oppressed by the line, had appealed to Congress for protection, and the recognition of their just rights. Congress at length realized that the despised Surgeon was not a mere excrescence on the naval body; that he shared like dangers, endured like privations and hardships, was as liable to wounds and death in time of action, as any officer of the line, ("no red cross protects the Surgeon upon the ocean,") that he had no peculiar protection from shipwreck or pestilence in peace. That upon the skill, integrity, and sleepless vigilance of the medical officer depended the health and efficiency of the whole ship's crew, and thereupon determined and enacted that the Medical Corps should have fixed rank, and the privilege of promotion according to prescribed rules.

This brings us to section 421 of the Revised Statutes,

which is the law to be examined and construed by this honorable Committee with reference to the pending nomination. As Chief Justice Carter would say, "the heart of the case beats right here." The sole question being what was the intent of Congress in enacting this section?

The section reads as follows: "The Chiefs of the several bureaus in the department of the Navy shall be appointed by the President, by and with the advice and consent of the Senate, from the classes of officers mentioned in the next five sections respectively, or from officers having the relative rank of Captain in the Staff Corps of the Navy, on the active list, and shall hold their offices for the term of four years."

The several bureaus referred to in this section are of yards and docks, of equipment and recruiting, of navigation, of construction and repairs, of steam engineering, of provisions and clothing, and of medicine and surgery.

If we do not stick in the bark, (*cortice*) if we inquire after the soul of the law, if we keep the object of the statute in view; if we apply to the construction of the section the sound principle that all acts *in pari materia* are to be taken together, because they are considered as framed on one system, we must come to the conclusion that the last clause of the section expresses the true intent of Congress, to wit; The chief of the bureau of Medicine and Surgery *shall* be appointed by the President, "*from officers having the relative rank of Captain in the staff corps of the Navy on the active list,*" otherwise we are brought to the absurd conclusion that Congress intended to twice confer upon the President in the same section of the statute the power of appointing a Medical Director to the office of chief of bureau, first as included in the general term Surgeon, and again by the express mention of his grade.

The conclusive evidence, however, that the legislator in

this section intended to preserve the principle of the act of March 3, 1871, that, honor, emolument and advancement should be based upon rank, experience, age and length of service, is, that he uses the very language of the earlier statute, with the single exception of the word "*may*," which he changes, undoubtedly for the purpose of excluding all possible excuse for disregarding the enactments, into the mandatory word "*shall*."

It will be observed that each of the first four sections referred to in section 421 contains some limitation to control the appointing power, such as number of years, skill and rank; but the last of the five sections contain no such limitation, it must be sought for in section 421, where it, as I hope I have shown, properly belongs, or else a too grateful member of a cabinet might select, if he chose, number eighty upon the list of Surgeons, still in his "green and salad days," and *detail* (section 4376. "A Surgeon, Assistant-Surgeon, or passed Assistant-Surgeon, may be *detained* as Assistant to the Bureau of Medicine and Surgery,") number one on the list, who had grown old and gray in the service of his country, as his *assistant*.. I cannot, however, dismiss the subject without paying a deserved tribute to that admirable thrift exhibited by the honorable Secretary in thus ennobling his Surgeon, whose medicine had proved alike efficacious and inexpensive. I feel it to be my duty, likewise, to commend to the world this expression of gratitude, a virtue not always to be found in high places.

" I hate ingratitude more in a man,
Than lying, vainness, babbling, drunkenness,
Or any taint of vice whose strong corruption
Inhabits our frail blood."

Yet, if the honorable Secretary's dignity requires that he

should be physicked by a Commodore, I modestly advise him to change his physician rather than to violate the law. Yet truth imposes upon me the duty which I perform with supreme reluctance of adding by way of admonition, that however inexpensive this eccentric performance may be to the honorable Secretary, yet the principle that it violates may make it dear to the nation.

He strikes at the very root of civil service reform, *the fairest flower of this Administration*. In conclusion, I pray leave to appeal in the name of justice, in the name of decency, to this honorable Committee, to promptly arrest this clear attempt to violate the law, and thereby to administer a rebuke to the real author, that will stand as a lesson for all time. Propriety requires me to say that for his Excellency, the President of the United States, who has no doubt, as an act of official courtesy merely, presented the name selected by his honorable Secretary, to the Senate, I feel that profound respect that his exalted office inspires in the breast of all loyal citizens.

ROBERT CHRISTY,
Amicus Senatûs.

List of Medical Directors on active list and date of retirement at the age of 62 from January 1, 1880.

NAME.	RETIRES.	Years and Months to serve.	
L. J. Williams	Oct. 14, 1881	1	9½
M. Duvall.....	June 9, 1880		5 m. 9 d.
P. J. Horwitz.....	March 3, 1884	4	2
C. Martin.....	Aug. 21, 1884	4	6¾
F. M. Gunnell.....	Nov. 27, 1889	9	10
J. Suddards.....	Feb. 27, 1889	9	2
E. Shippen.....	July 18, 1888	8	6½
S. F. Coues.....	Sept. 17, 1887	7	9½
J. S. Dungan.....	Jan'y 29, 1887	7	1
George Peck.....	July 9, 1888	8	6
Jno. M. Brown.....	May 10, 1893	13	4
Thos. J. Turner.....	Sept. 10, 1891	11	9
Jno. Y. Taylor.....	Jan'y 21, 1893	13	1
W. T. Hord.....	March 3, 1892	12	2
A. L. Gihon.....	Sept. 28, 1895	15	8